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Compulsory Agreement to Substantive Provisions: A Remedy Not Allowed

Edward A. Griffis

(3) Were dividends distributed which were less than the current earnings or in excess of current earnings?

As shown by the previous analysis, only where the advances are equity advances which are disproportionate to the common stock interest with dividends paid which are in excess of current earnings does a second class of stock exist within the congressional intention of section 1371(a)(4).

It was previously stated that the court reached the correct result in *Stinnett*. To verify that statement the above tests are applied to the facts of that case. The court clearly stated that it construed the advances to be equity advances, and petitioner admitted that the advances were disproportionate. However, since the notes were non-interest bearing, no "preferred dividends" were paid. Therefore, no dividends were distributed in excess of current earnings, and the stock did not constitute a second class of stock.

Since regulation § 1.1371(g) was declared invalid as applied to the facts of *Stinnett*, hopefully the commissioner will acquiesce to that position and amend the regulations to provide the three step test to determine whether advances constitute a second class of stock. Such a test would make the regulation in agreement with the congressional intent prohibiting a second class of stock and would put at rest a controversy which remains unsettled after twelve years of existence.

J. Edgerton Pierson, Jr.

COMPULSORY AGREEMENT TO SUBSTANTIVE PROVISIONS: A REMEDY NOT ALLOWED

The National Labor Relations Board found the company's refusal to bargain about a checkoff clause was not made in good faith and was done solely to frustrate the making of any collective bargaining agreement. The Court of Appeals for the District of Columbia approved this finding.[1] That court also enforced the Board's order to the company to cease and desist from refusing to bargain in good faith and to further bargain over the checkoff if the union so requested. The court implied that the Board could require the company to agree to a checkoff

1. United Steelworkers v. NLRB, 363 F.2d 272 (D.C. Cir. 1966).

provision as a remedy.[2] On a motion to clarify its opinion, the court held that in certain circumstances a "checkoff may be imposed as a remedy for bad faith bargaining."[3] On remand, the Board issued an order including such a remedy which was then affirmed by the court of appeals.[4] The United States Supreme Court reversed and held, while the Board has power to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The National Labor Relations Act sets forth the national policy of encouraging the practice of collective bargaining.[5] To insure compliance with this policy, Congress made it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.[6] In 1947 Congress amended the Act stating in § 8(d):

> "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."[7]

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2. *Id.* at 276 n. 16: "To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by statute."

3. United Steelworkers v. NLRB, 389 F.2d 295, 298 (D.C. Cir. 1967).

4. H. K. Porter Co. v. NLRB, 414 F.2d 1123 (D.C. Cir. 1969).

5. 29 U.S.C. § 151 (1964).

6. 29 U.S.C. § 158(a) (5) (1964). Congress also made it an unfair labor practice for the representatives of the workers not to bargain, but such a problem seldom arises.

7. *Id.* § 158(d). This section of the NLRA was added by Congress in 1947. From the inception of the NLRA in 1935 until 1947 there had been great concern in Congress and by the Supreme Court that the government might compel agreement between employers and employees. S. REP. No. 573, 74th Cong., 1st Sess. 12 (1935); 79 CONG. REC. 7659 (1935); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937). In 1947 the congressional concern over this issue had not subsided and in H.R. REP. No. 245, 80th Cong., 1st Sess. 19-20 (1947) the committee said: "[T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make . . . . [U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements."

In *NLRB v. American National Insurance Co.*,[8] the Supreme Court considered the effect of § 8(d). It found clearly ". . . that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[9] It seems certain from the language of § 8(d) that the Board cannot compel either party to agree to a proposal or require a concession. However, the Court's broad language that the Board may not "sit in judgment upon the substantive terms" has been tempered by subsequent circuit court decisions.

The Fifth Circuit, in *NLRB v. Herman Sausage Co.*,[10] stressed the need for consideration of the substantive terms of an agreement when it said:

> "[B]ad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail."[11]

Many other cases indicate that "surface bargaining" will not be tolerated[12] and the lack of concession on a substantive term is evidence of this kind of bargaining. Even the Court in *American National Insurance* made it clear that the "no-concession" clause of § 8(d) was not to be interpreted so as to make the "good faith" clause meaningless.[13] In *NLRB v. Reed & Prince Manufacturing Co.*, Judge Magruder emphasized that, though the Board may not compel agreement on a particular provision, the lack of concession is some evidence of bad faith.[14] To determine whether bad faith exists, the Board must

8. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).
9. *Id.* at 404.
10. 275 F.2d 229 (5th Cir. 1960).
11. *Id.* at 232.
12. *See, e.g.*, NLRB v. Athens Mfg. Co., 161 F.2d 8 (5th Cir. 1947); Stonewall Cotton Mills, Inc. v. NLRB, 129 F.2d 629, 631 (5th Cir. 1942); NLRB v. Whittier Mills Co., 111 F.2d 474, 478 (5th Cir. 1940).
13. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952): "And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences."
14. 205 F.2d 131, 134-35 (1st Cir. 1953): "In other words, while the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all."

look to the totality of the circumstances;[15] the lack of concession by the employer is but one factor.[16] A standard of "reasonableness" is then applied to distinguish between a bad faith refusal to bargain and a hard bargaining stand made in good faith.[17]

Once it has been decided that there was a refusal to bargain, the Board must fashion a remedy. Section 10(c) of the Act gives the Board wide discretion in fashioning remedies by allowing it to issue cease and desist orders and to take other "affirmative action."[18] The Supreme Court has stated that the Board alone[19] has the power to determine the particular means by which the effects of an unfair labor practice are to be expunged.[20] However, the Board's orders will be disturbed by the court whenever there is a patent attempt to achieve ends other than those effectuating the policies of the NLRA.[21] Occasionally, at the same time that the Board's remedy is fulfilling one policy it is undermining an equally important policy.[22] Therefore, the Board must carefully examine the potential ramifications of an order before it is issued.

In *H. K. Porter* the court of appeals in judging the company's stand on the checkoff clause, a substantive term of the

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15. For a more complete discussion, *see* Maxwell, *The Duty to Bargain in Good Faith, Boulwarism, and a Proposal—The Ascendance of the Rule of Reasonableness*, 71 DICK. L. REV. 531 (1967).

16. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953); NLRB v. General Electric Co., 418 F.2d 736, 757 (2d Cir. 1969).

17. NLRB v. General Electric Co., 418 F.2d 736, 757 (2d Cir. 1969): "While GE may have believed that it was acting within its 'rights' in offering a take-it-or-leave-it proposal, doing so may still be some evidence of lack of good faith. Here there was no substantial justification offered for refusing to discuss the matter . . . ." When a court says that there is "no substantial justification," it is obviously judging the reasonableness of the employer's stand.

18. 29 U.S.C. § 160(c)(1964): "If . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any . . . unfair labor practice, then the Board shall . . . cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter [the Act] . . . ."

19. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941): "[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . . ."

20. May Dep't Stores v. NLRB, 326 U.S. 376 (1945); NLRB v. Link-Belt Co., 311 U.S. 584, 600 (1941); NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 271 (1938).

21. 29 U.S.C. § 160(c)(1964); Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 216 (1964); Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943); Local 57, ILGW v. NLRB, 374 F.2d 295, 300 (D.C. Cir. 1967).

22. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953). For examples of the Board's difficulties in coordinating the various policies of the Act, *see* Note, 112 U. PA. L. REV. 69, 78 (1963).

negotiation, found it to be unreasonable[23] and a violation of § 8(a) (5) of the Act. This action was consistent with recent jurisprudence in this area.[24] The Supreme Court agreed with the lower court's action, thereby overruling its earlier dictum in *American National Insurance* that substantive terms were beyond the Board's examination.[25] However, the Supreme Court disagreed with the lower court's holding that in certain circumstances a "checkoff may be imposed as a remedy for bad faith bargaining. . . ."[26] This was the first time in the history of the National Labor Relations Act that the Board had ordered a party to agree to a substantive term of an agreement as a remedy for a refusal to bargain in good faith.

The court of appeals obviously reasoned that the Board, in utilizing fully its wide discretion to fashion remedies was justified in ordering this remedy;[27] section 8 (d) in spite of its "no-concession" clause, did not limit the Board's remedial power. It was their opinion that § 8(d) related to a determination of whether a refusal to bargain violation had occurred and not to the scope of the remedy which would be appropriate for the violation.[28] The Supreme Court agreed that this may be true as a matter of literal interpretation, but the Court added that this interpretation did not justify the "conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d)."[29]

The Supreme Court reasoned that it would be inconsistent to hold that § 8(d) prohibited the Board from relying on a "refusal to agree" as the sole indicator of bad faith and, at the same time, to allow the Board to compel agreement in the same dispute. While the Court admitted that the Board's remedial powers are broad, it emphasized that these powers are limited

23. United Steelworkers v. NLRB, 363 F.2d 272 (D.C. Cir. 1966). The court of appeals found that the company's objection to a checkoff was not due to any policy against making deductions from the employees' pay. The company had already made deductions for taxes, insurance, and other items. H. K. Porter's objection was not based on inconvenience, but only on an unwillingness to help the union. By judging the stand taken by H. K. Porter as having no legitimate business reason, the court was applying the test of "reasonableness."

24. *See* note 15 *supra* and accompanying text.

25. H. K. Porter Co. v. NLRB, 90 S. Ct. 821, 825 (1970): "[T]he Court of Appeals approved the further finding that the employer had not bargained in good faith, and the validity of that finding is not now before us."

26. United Steelworkers v. NLRB, 389 F.2d 295, 298 (D.C. Cir. 1967).

27. *Id.*

28. *Id.*

29. H. K. Porter Co. v. NLRB, 90 S. Ct. 821, 825 (1970). *See* note 7 *supra.*

to effectuating the policies of the Act. The remedy of compulsory agreement to a term violated the policy of freedom of contract. Although freedom of contract is not absolute under the Act a fundamental premise is that there should be "private bargaining under governmental supervision of the procedure alone."[30]

The decision in *H. K. Porter* seems clearly correct. The Board should fashion remedies directed toward allowing the parties to come to the table to bargain with each other. If the remedy itself sets the terms of an agreement, there is no possibility of bargaining. Thus, the remedy of compulsory agreement exceeds the limitation of effectuating the policies of the Act.

Unfortunately, the *H. K. Porter* opinion included unneeded dictum. In the process of pointing out possible reasons for the court of appeals' decision, the Supreme Court stated that the Act did not forbid "an employer or a union to rely ultimately on its economic strength to secure what it cannot obtain through bargaining."[31] This general statement was erroneous in the context of the present case where an unfair labor practice had been committed by the employer. Although Congress has left intact the right to use the economic weapons of strike and lockout when an impasse is reached during *good faith* bargaining,[32] in the instant case the employer's bad faith posture presented a different situation. A union strike would not have been considered an economic strike, but an unfair labor practice strike.[33] Nor could the company have used a lockout since there

30. H. K. Porter Co. v. NLRB, 90 S. Ct. 821, 826 (1970).

31. *Id.*

32. Publishers' Ass'n v. NLRB, 364 F.2d 293, 296 (2d Cir. 1966), *cert. denied*, 385 U.S. 971 (1966).

"[Congress] has recognized and enforced the employees' right to self organization and collective bargaining, but left intact the right to use the economic weapons of strike and lockout when good faith bargaining fails . . . ."

33. *See* NLRB v. Southland Cork Co., 342 F.2d 702 (4th Cir. 1965) where a strike called because of employer's failure to bargain in good faith was deemed an unfair labor practice strike. The result of being an unfair labor practice strike instead of an economic strike is a favorable position for the union members. The strikers are entitled to immediate reinstatement upon request even if it means the employer must discharge replacement workers. NLRB v. Pecheur Lozenge Co., 209 F.2d 393, 404-05 (2d Cir. 1953), *cert. denied*, 347 U.S. 953 (1954).

was a finding of unlawful intent on its part to evade the duty to bargain collectively.[34]

Probably, no chance of confusion would have resulted from the improper dictum discussed above had the Supreme Court been careful to apply the *H. K. Porter* decision to the issue of the propriety of the remedy ordered by the Board. However, the Supreme Court applied *H. K. Porter* to *Tex Tan Welhausen Co. v. NLRB*,[35] a case presenting not only the issue of the propriety of the remedy ordered by the Board, but also the issue of bad faith bargaining. The Supreme Court remanded *Tex Tan* to the Fifth Circuit for "further consideration in light of *H. K. Porter*," even though the Fifth Circuit had concluded:

> "The Board's order does no more than require the Company to bargain in good faith . . . . Contrary to Tex Tan's assertions the order only requires that any agreement reached be incorporated into the contract. The Board did not attempt to dictate what the agreement might be."[36]

If the Supreme Court disagreed with this conclusion and believed the Board's remedy improper, it should have been more explicit since the issue of bad faith was also before the Court in *Tex Tan*. On the other hand, if the Court was unhappy about the finding of bad faith by the Board, it should not have cited to the lower court a case which did not deal with the issue of bad faith. However, the Fifth Circuit in considering *Tex Tan* on remand properly refused to discuss the issue of bad faith, and, instead, changed its original holding concerning the propriety of the remedy ordered by the Board.[37]

The instant case is important because it limits the Board's remedial powers. Unless this power is limited, the government is free to impose its will on labor and management by dictating

34. *See* American Shipbuilding Co. v. NLRB, 380 U.S. 300, 308 (1965): "It is important to note that there is here no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining." An inference can be drawn that a lockout would not be allowed if there exists a refusal to bargain in good faith. NLRB v. Golden State Bottling Co., 401 F.2d 454, 456-57 (9th Cir. 1965): "[A] lockout . . . does not violate Section 8(a)(3) and (1) unless there exists a supportable finding of unlawful intent on the part of the employer to injure a labor organization or to evade his duty to bargain collectively . . . ." *See also* NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 894 (5th Cir. 1962).

35. 90 S. Ct. 1516 (1970).

36. Tex Tan Welhausen Co. v. NLRB, 419 F.2d 1265, 1270-71 (5th Cir. 1969).

37. Tex Tan Welhausen Co. v. NLRB, 434 F.2d 405, 407 (5th Cir. 1970).

the terms of an agreement. Although only good intentions may motivate the Board, governmental determination of substantive terms would destroy the collective bargaining process since there would be no "bargaining" between the private parties. The collective bargaining process is valuable in maintaining peaceful labor relations. Congress evidently agreed when it made the encouragement of collective bargaining a major policy of the NLRA. The broad remedial power given to the Board to effectuate this policy should not be used to destroy it. Therefore, the Board's remedial power must necessarily be limited so as to encourage bargaining between labor and management.[38]

Edward A. Griffis

MINERAL LEASES—LESSEE DRAINING OTHER OF HIS LEASED PREMISES CONSIDERED AS AN ACTIVE BREACH

Plaintiff-lessors sued their lessee in federal district court[1] seeking an accounting for drainage of oil and gas from beneath their premises caused by lessee's operations on adjoining premises. In the alternative plaintiffs prayed for damages for drainage because of lessee's breach of the implied obligation to protect the leased premises from drainage. Defendant-lessee moved for summary judgment, claiming *inter alia* that plaintiffs' failure to place lessee in default barred their action for damages. The motion was denied as to the necessity of a putting in default. Both parties appealed, and the court of appeals affirmed, holding that the failure of lessors to give notice in this case and under these circumstances would not bar their action for damages because Louisiana courts[2] would characterize lessee's failure to prevent drainage as an active breach of the lease contract. *Williams v. Humble Oil and Refining Co.*, 432 F.2d 165 (5th Cir. 1970), *rehearing denied*, 435 F.2d 772 (5th Cir. 1970).

The question of recovery of damages for drainage was put

38. H. K. Porter v. NLRB, 90 S. Ct. 821, 826 (1970): "It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board nor the courts to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands."

1. Federal jurisdiction was based upon diversity of citizenship under 28 U.S.C. § 1332 (1964).

2. Since there was no federal law governing the case the federal courts were bound to apply the law of the forum state under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938).